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Citation: 2010 PSLRB 72

Public Service
Labour Relations Act

Before the Chairperson

BETWEEN

KENDA FEATHERSTON

Applicant

and

DEPUTY HEAD
(Canada School of Public Service)

Respondent

and

DEPUTY HEAD
(Public Service Commission)

Respondent

Indexed as
Featherston v. Deputy Head (Canada School of Public Service) and Deputy Head (Public Service Commission)

In the matter of an application for an extension of time referred to in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* and in the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson and adjudicator

For the Applicant: Ian J. Smith, counsel

For the Respondent: Doreen Mueller, counsel, and Karine Renoux

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Heard at Edmonton, Alberta,
April 7 and 8, 2010.

I. Application before the Chairperson

[1] Kenda Featherston ("the applicant") was employed at the Canada School of Public Service (CSPS) in Edmonton until January 31, 2006. She had been on leave from October 10, 2005 for medical reasons. The applicant filed a grievance alleging constructive dismissal dated February 17, 2006, and received by the Deputy Head of the CSPS on February 21, 2006. The Deputy Head rejected the grievance because it was untimely. The Deputy Head raised timeliness at every level of the grievance process and in correspondence to the Public Service Labour Relations Board (PSLRB). The applicant disputed that the grievance was untimely and in the alternative requested an extension of time.

[2] Pursuant to section 45 of the *Public Service Labour Relations Act* ("the *PSLRA*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, the Chairperson has authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions under paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") to hear and decide any matter relating to extensions of time.

[3] The Deputy Head has raised a number of additional objections to the jurisdiction of an adjudicator to hear this grievance. This decision addresses only the application for an extension of time.

[4] The applicant testified, and one witness testified for the Deputy Head.

[5] The Deputy Head requested a sealing order for a memorandum of settlement between the parties that it wished to introduce as an exhibit. The applicant objected and submitted that the document could go on the record. I reviewed the memorandum of settlement and determined that it should be sealed. From the language of the settlement, it was clear that the parties intended there to be no publicity of the resolution of the matter in dispute and no precedent created. In the interests of sound labour relations, it is preferable to protect such settlements. I have referred only to the relevant part of the document in the summary of the evidence.

II. Summary of the evidence

[6] The applicant commenced employment in the federal public service in 1969. She worked with Training and Development Canada, a part of the Public Service

Commission (PSC), and transferred to Edmonton in 1990. In 2004, Training and Development Canada was merged with two other organizations to create the CSPS.

[7] The applicant was employed as a regional learning consultant and was classified in the Personnel Administration (PE) group from 1992 to the date of her departure from the public service. The PE group is unrepresented and has no statutory right to collective bargaining. For unrepresented employees, the applicable limits for filing a grievance are contained in the *Regulations*. The prescribed time limit for filing a grievance is 35 days from the day ". . . on which the grievor had knowledge of the alleged violation or misinterpretation or any occurrence or matter affecting the grievor's terms and conditions of employment." See subsection 68(1).

[8] The applicant alleged that she had been working in a poisoned environment due to harassment that began in 1995. Most of the allegations relating to the work environment are not relevant for the purposes of this application. I have summarized only the evidence that is relevant.

[9] Commencing in 1995, the applicant experienced a difficult working relationship with a subordinate co-worker. She was not the supervisor of that individual but did exercise some functional supervision. The applicant testified that the problems in the workplace intensified in 1997. She also testified that she had a difficult working relationship with her supervisor, who was located in Vancouver.

[10] In 1998, the applicant started having health problems related to the ongoing problems in the workplace (corroborated by a doctor's letter, dated June 3, 2002: Exhibit A-1). She was advised by her doctor to take sick leave at the end of December 1999, and she complied and took some time off work. In June 2000, the applicant was advised by her co-worker that the supervisor based in Vancouver had asked her to monitor the applicant's absences from the office. The applicant raised it with David Beckman, the regional director, on June 8, 2000 (Exhibit A-2). In her communication to Mr. Beckman, she outlined her concerns and asked that they be kept confidential.

[11] Early in 2001, the applicant was advised of the possibility of a harassment complaint being made by her co-worker. Mediation was suggested, and she initially refused because of confidentiality concerns.

[12] The applicant later met with Mr. Beckman. He told her that her only option was to obtain legal counsel because she was an unrepresented employee. He told her that "there was no other avenue open." In examination-in-chief she testified that she was "directed to get a lawyer." In cross-examination, she stated that it was presented as her only option but that she was not told that she had to retain a lawyer. She also testified that she contacted labour relations officials in Ottawa and was advised that they could not assist her in any harassment complaint made against her. The applicant retained legal counsel and subsequently agreed to mediation on June 4, 2001 (Exhibit A-3). Mediation did not take place until July 2002. Ultimately, no harassment complaint was made.

[13] The applicant asked Mr. Beckman for an assignment as a break from the workplace and was given six weeks from February 2001 until April 2001. After completing the assignment, she was seconded to a position as a staffing officer. The applicant testified that the harassment by her former co-worker and others continued while in that position.

[14] In October 2002, the applicant met with Mr. Beckman, counsel for the PSC and her own counsel. She testified that she did not recall what was said at the meeting, that is was "very legal" and that she "couldn't wrap her head around it." She testified that she was not told that she had a right to file a grievance or to make a harassment complaint. In fact, in correspondence to counsel for the PSC, her then counsel, Chantell evan, wrote it was stated at the meeting that the applicant did not have any recourse under the *PSSRA* (Exhibit A-7).

[15] The applicant commenced litigation against the Deputy Head on November 22, 2002. In the statement of claim (Exhibit A-5), she wrote that the PSC had a duty to enforce its harassment policy and that she had suffered mental, emotional and financial hardships as a result of harassment. She sought damages for the breach of duty to enforce the harassment policy, for emotional stress, damages for the loss of increased pensionable earnings and ". . . such further and other damages as may be proven at the time of the trial of this action."

[16] The statement of defence, filed by the PSC on January 14, 2003 (Exhibit R-3), denied all the central allegations in the applicant's claim. It stated that she ". . . has never filed a grievance alleging harassment."

[17] The applicant testified that, in July 2003, Mr. Beckman asked her "who was running this case," her or her lawyer? She testified that her job in staffing was increasingly difficult. She went on sick leave in late July 2003 and went on long-term disability leave in August 2003 (Exhibit A-6). She testified that she was unable to function for a period, until she saw a medical professional and her medication started to work. She testified that her health began to improve by October 2004.

[18] On January 7, 2005, the applicant filed an amended statement of claim with the court (Exhibit R-5). It repeated the same allegations from 1995 and added additional allegations from October 2003. It also claimed that, because of the PSC's actions and the failure to return the applicant to her substantive position, she had been constructively dismissed. The amended statement of claim requested 24 months "notice or payment in lieu of notice" and a further 6 months payment in lieu because of the PSC's ongoing conduct. The applicant filed an affidavit of documents for the court proceeding on January 25, 2005 (Exhibit R-4).

[19] On March 21, 2005, counsel for the Deputy Head responded to a request from the applicant's counsel to amend the statement of claim (Exhibit R-6). She wrote as follows that the Deputy Head was not prepared to consent to the amended statement of claim because the applicant was covered by the *PSSRA*:

. . .

> *. . .That* Act *provides a grievance procedure to deal with her allegation of dismissal (indeed, even her original allegations regarding harassment). In the circumstances, the Court of Queen's Bench should decline jurisdiction to entertain her claim. In this regard, I refer you to the recent decision of the Supreme Court of Canada in Vaughan v. Canada [2005] S.C.J. No. 12.*

. . .

[20] Counsel for the applicant replied on May 18, 2005 (Exhibit A-7). In the letter, counsel stated that the applicant had been told by a representative of the Deputy Head that she could not file a grievance because ". . . she was in a management position." The letter concluded as follows:

> *Our client is prepared to file a grievance and proceed on that basis, but, of course, does not want the argument made that she is not entitled to avail herself of the grievance procedure,*

> *nor that she is barred in some manner from proceeding with her grievance based on the passage of time.*
>
> *As such, I would request that you provide confirmation that Ms. Featherston may indeed proceed with the grievance procedure and that those arguments will not be made in defence.*

[21] On July 22, 2005, counsel for the Deputy Head replied (Exhibit R-7) and noted that, with respect to any grievance to be filed, her client was ". . . not prepared to agree to any sort of accommodation regarding the passage of time." She also noted that her client had no recollection of the conversations referred to in the letter.

[22] The applicant returned to work on a gradual basis on June 8, 2005, returning to full-time on September 1, 2005. She testified that she was focused on making her return to the workplace successful. However, the applicant alleges that the hostile work environment continued.

[23] The applicant wrote to Richard Rochefort, Senior Director General, Client Relations and Partnerships CSPS, sometime in August 2005 (undated note: Exhibit R-8). The applicant testified that she contacted him because she admired and trusted him. She had talked to him about her work situation sometime in 2004. In her note, she discusses her return to work. The applicant wrote that her initial goal was to work for 23 months to be able to make pension contributions that she still owed. However, from the middle to the end of July, she had experienced a "noticeable decrease" in her recovery. The applicant requested that she be put on paid leave until she officially retired on November 15, 2005. She asked that her request be kept confidential because she did not feel comfortable discussing the option with anyone else. Later in the fall, Mr. Rochefort spoke with the applicant by telephone and asked her why she wanted things kept confidential. The applicant testified that she was afraid to tell him what was going on. In re-examination, she testified that she did not feel that, if the information went beyond him, it would be believed. She testified that she knew that she would probably have to retire, and she did not want to get him involved.

[24] On September 23, 2005, the applicant sent an email to her compensation advisor stating that she wanted to retire on January 31, 2006 (Exhibit R-9). On October 5, 2005 she asked about matters relating to her retirement in an email to her compensation advisor (Exhibit R-9). She also wrote that she had a part-time job arranged for when she retired. She testified that she did not take the part-time job, and

she also testified that she had not been looking for a job but that she had been approached about the part-time position.

[25] On or about October 10, 2005, the applicant collapsed and was hospitalized for three days. She was advised by her doctor that she could not return to the workplace.

[26] The applicant received documentation from the compensation advisor on October 27, 2005, outlining the benefits she would receive on retirement (Exhibit R-10).

[27] The applicant testified that she was recovering from her collapse until the end of 2005. She was able to contemplate filing a grievance only in January or February 2006. In examination-in-chief, the applicant was asked why she did not file a grievance in 2005. She testified that she did not because she wanted to focus on her return to work and because she did not feel that she could focus on the issues related to a potential grievance. She blamed herself for what was happening. She was incapacitated and therefore could not instruct anyone to file a grievance on her behalf.

[28] The applicant retired on January 31, 2006. She testified that she retired for health reasons. After retiring, she was approved for a medical retirement. She had wanted to work for another two years. She testified that she had no choice but to retire.

[29] The applicant filed a grievance on February 17, 2006 (Exhibit R-1). Although the grievance contains more detail than the statement of claim, the parties to this application agreed that the details of the grievance and the corrective action are essentially the same as those in the statement of claim.

[30] In cross-examination, the applicant was shown a memorandum of agreement dated September 7, 1994 (Exhibit R-11). This exhibit is sealed because of its confidential nature. The matter in dispute was not related to the grievance filed by the applicant. She was shown a term of the agreement that stated in part as follows: "Ms. Featherston agrees to refrain from making any other representations or file [*sic*] actions, complaints and/or grievances . . . in relation to the subject matter of this complaint. . . ." She was asked if she had "some awareness" that she could file a grievance. She replied that she guessed that she would agree with that statement. In re-examination, she testified that the settlement did not relate to a grievance or a complaint.

[31] In examination-in-chief, the applicant was asked why the grievance was important to her. She testified that she wanted the complaint against her to be resolved, that she had been very proud of her job and career, and that there was a "black mark" against her. She testified that she wanted "closure." She also testified that she had suffered financially as a result of the actions of the PSC and the CSPS.

[32] The applicant received a number of awards for her work with the PSC. Mr. Rochefort testified that he thought highly of the applicant and of her work in the 1990s.

[33] Mr. Rochefort testified that three of the managers involved in the matters related to the grievance have retired. The co-worker in question transferred out of the CSPS in 2007.

III. Summary of the arguments

[34] The parties made written submissions in correspondence to the PSLRB as well as at the hearing. I have considered both written and oral submissions and have summarized them as follows.

A. For the applicant

[35] Counsel for the applicant submitted that the applicant was wronged by her deputy head in the final years of her employment. The ultimate wrong would be the denial of her right to a full hearing on the merits.

[36] In the grievance, the applicant set out the following reasons to support an exception to the time limits for filing a grievance:

- The advice from the Deputy Head that the applicant did not have access to the grievance procedure, which she relied on.
- The applicant's ongoing medical problems, which have required intensive medical care, including hospitalization.

[37] In correspondence to the Board dated May 8, 2009, counsel for the applicant raised the additional reason of the applicant's fear of filing a grievance while still employed by the CSPS.

[38] At the hearing, the applicant submitted that the grievance was timely. In the alternative, the applicant requested an extension of time.

[39] Counsel for the applicant stated that it was clear from the evidence that someone in authority had told her that she could not file a grievance, and she relied on that representation. So, she did the only thing she could have done to protect her rights and filed a court action. She was "grieving" in the only form she believed open to her. Both parties engaged in the court process, and there was an implicit agreement between them that court was where her rights were to be adjudicated. When the statement of claim was filed, and subsequently, the Deputy Head did not raise any timeliness objections and did not state that the applicant had no right to pursue her claim in court. The Deputy Head was aware at the time of the applicant's concerns about the workplace and was in fact aware of the "grievance." It is common ground that the court claim and the grievance are essentially the same.

[40] Counsel for the applicant submitted that had the Deputy Head acted reasonably, it would have acknowledged that the matter had been in the wrong forum but that it had not advised the applicant of that fact. The Deputy Head would then have recognized that good labour relations demanded that it accept the statement of claim as a grievance. The Deputy Head knew that the applicant had grieved through filing a court claim. It was fundamentally unfair to tell her to "get a lawyer," to fight the case for two years and to ultimately pull the rug out from under her, telling her that she was "at the wrong dance."

[41] Counsel for the applicant submitted that the grievor had filed her grievance on time when she filed her court claim. The court claim was amended as the breaches of her rights persisted. In these circumstances, the Deputy Head should be estopped from relying on the strict procedural steps of filing a grievance.

[42] Counsel for the applicant stated that, if I do not accept that the grievance was timely for that reason, it was still timely because it was filed within the time limits after her involuntary retirement on January 31, 2006. The applicant had wanted to make her return to work successful but was unable to and felt that she had no options other than to retire. Her retirement was not voluntary but was akin to a dismissal. She filed her grievance 18 days after her involuntary retirement, well within the 35-day time limit for filing a grievance as set out in the *Regulations*.

[43] In the alternative, if I do not accept that the grievance was timely, the applicant requested an extension of time, in the interests of fairness. I was referred to the following five criteria for assessing whether to grant an extension of time, as detailed in *Richard v. Canada Revenue Agency*, 2005 PSLRB 180:

. . .

- *clear, cogent and compelling reasons for the delay;*
- *the length of the delay;*
- *the due diligence of the grievor;*
- *balancing the injustice to the employee against the prejudice to the employer in granting an extension; and*
- *the chance of success of the grievance.*

. . .

[44] Counsel for the applicant submitted that the facts in *Richard* were congruent with the facts in this case. He also referred me to some of the written submissions. It was only with the assistance of third parties that the applicant was able to assess her right to grieve. She was in an emotionally fragile state, and from the moment she formed the intent to grieve, she was diligent in pursuing her rights.

[45] In weighing the criteria as detailed in *Richard*, counsel for the applicant submitted that I should keep in mind the weight to be given to each criterion, as summarized in *Thompson v. Treasury Board (Canada Border Services Agency),* 2007 PSLRB 59 as follows:

. . .

[7] It is self-evident that the particular set of circumstances defining each case must dictate the weight to be given to any one of the above criteria relative to the others. It would be patently unfair to attribute the same weight to each of these criteria irrespective of the factual context. Consequently, it behooves the Chairperson seized of an application for an extension of time to apply or at least attempt to apply each of the criteria to the facts of the particular case at hand. Once this exercise is completed, the Chairperson should then attribute the appropriate weight to each of the criteria based on the specific factual circumstances that may, in some

> *instances, justify attributing all or most of the weight to only one or two of the criteria.*
>
> *. . .*

[46] *Thompson* also notes, at paragraph 17, the challenges of determining the chances of success of the grievance without hearing the case on its merits and objectively examining all the evidence.

[47] In addition, counsel for the applicant noted that in *Thompson,* at paragraph 19, the Chairperson stated that fairness dictated that the applicant should not be penalized by the action or inaction of her bargaining agent representative ". . . in whom she had placed her full confidence." He submitted that the applicant should not be penalized because of the actions of her counsel.

[48] Counsel for the applicant also referred me to *Jarry and Antonopoulos v. Treasury Board (Department of Justice),* 2009 PSLRB 11. In terms of measuring the chances of success of the grievance, the test should be whether the grievor has an "arguable case." In that case, the Vice-Chairperson concluded that the delays in referring the grievance to the final level of the grievance process were due to errors made in good faith by counsel for the grievors and that in light of the due diligence of the grievors, they should not be deprived of their recourse or otherwise penalized by their counsel's error. Similar considerations apply here.

[49] Counsel for the applicant referred me to *Riche v. Treasury Board (Department of National Defence),* 2009 PSLRB 157. In that case, the applicant's medical condition provided a *prima facie* case for his failure to file his grievances within the time limits. In addition, the applicant had formed the intention to grieve and had communicated that intention to the Deputy Head in an email. Furthermore, the Vice-Chairperson noted in *Riche* that the issue of fading memories applied to both parties. The circumstances for Ms. Featherston are similar to the circumstances in the *Riche* case.

[50] Counsel for the applicant stated that the applicant's length of service was a relevant factor to consider. Also, her health issues should be a factor in deciding whether to grant an extension of time. For years, the applicant was unaware of her ability to access the internal grievance procedure. The issue of fading memories affects the applicant as much as it affects the Deputy Head. There is a copious documentary

record that can be relied upon by both parties in a hearing on the merits of the grievance.

[51] Counsel for the applicant submitted that not all the criteria for granting an extension of time need to be met or to be given the same weight. He stated that it is not appropriate to consider the chances of success of the grievance as a factor without hearing the evidence on the merits.

[52] The actions of the applicant were made in good faith. Her intention to grieve was communicated to the Deputy Head when her statement of claim was filed.

[53] The fact that the applicant inquired about retirement in 2005 does not take away from the fact that it was her intention to retire in 2007.

[54] The memorandum of agreement signed by the applicant in 1994 is not relevant (Exhibit R-11). In the circumstances of that situation, she had not made a complaint and she had no need to access the grievance procedure.

B. <u>For the respondent</u>

[55] On May 19, 2009, counsel for the Deputy Head submitted in correspondence to the PSLRB that the applicant had not shown any clear, cogent and compelling reasons for the delay in filing her grievance. The applicant knew, or ought to have known, the recourses available to her. It was her responsibility to seek and use the recourses available to her. She made a conscious decision not to grieve within the prescribed time limits.

[56] Counsel for the Deputy Head submitted at the hearing that the merits of the allegations raised by the applicant in her grievance are still under debate, and she urged me to examine the evidence closely and to only consider evidence that is relevant to my determination on the application for an extension of time.

[57] Counsel for the Deputy Head noted that the events complained of by the applicant in her grievance go back as far as 1995, making her grievance over 10 years late. Her allegations continue until October 2005, still four months late.

[58] The applicant was well enough to advance her litigation during periods of illness. She was also well enough to make a proposal to Mr. Rochefort. She was well

enough to discuss her retirement with a compensation advisor in 2005. Therefore, she was well enough to file a grievance, if that was her intention.

[59] Counsel for the Deputy Head referred me to the five criteria set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada),* 2004 PSSRB 1 (as reviewed in *Richard* and set out of this decision at paragraph 43). She submitted that, in the absence of a clear, cogent and compelling reason for the delay in filing a grievance, there was no need to proceed to the balancing process of the other criteria.

[60] Counsel for the Deputy Head stated that the applicant had been represented by counsel since 2001. In *Schenkman*, the Board Member stated at paragraph 77 that ". . . in a unionized environment, the expectation is that employees are responsible for being aware of their rights." That logic applies equally, if not more so, when an employee is represented by counsel.

[61] Counsel for the Deputy Head submitted that, with respect to the statement of claim filed by the applicant, it is not for the Deputy Head to second-guess the applicant's litigation strategy. The onus is not on the defendant to an action to tell a plaintiff what to do. The parties were in an adversarial relationship once litigation commenced. The applicant's complaint was against the Deputy Head, and it would be a conflict of interest for the Deputy Head to advise her on the appropriate course of action.

[62] Counsel for the Deputy Head stated that, in July 2005, the applicant acknowledged through her legal counsel that she was prepared to grieve (Exhibit A-7). She then proceeded to sit on her right to file a grievance, and the Deputy Head is entitled to take from this that she had changed her mind. Clearly, at this time the applicant had to start to take action. She was working and was communicating with human resources and Mr. Rochefort. It is a rational conclusion that she changed her mind about grieving, especially in light of her decision to retire.

[63] Counsel for the Deputy Head submitted that the applicant was represented by counsel at the meeting in 2002 when the representation was allegedly made that she could not access the grievance procedure. Given that fact, it is unreasonable to say that she relied on this statement. In addition, the evidence on the meeting was not clear. There was no evidence that the applicant had asked if she could grieve. She testified

that she "could not wrap her head around" what was being discussed at the meeting. The evidence is not entirely clear as to whether a misrepresentation was made.

[64] Counsel for the Deputy Head submitted that the applicant knew or ought to have known about her right to grieve as early as 1994, when she signed a memorandum of agreement acknowledging that right (Exhibit R-11).

[65] Counsel for the Deputy Head noted that, in the statement of defence filed in 2003, the Deputy Head stated that the applicant had not filed a grievance (Exhibit R-3). This should have raised a red flag to the applicant and her counsel. The Supreme Court of Canada's decision in *Vaughan v. Canada,* 2005 SCC 11, just confirmed the existing jurisprudence, and was not a new development on the right to grieve.

[66] Counsel for the Deputy Head stated that the evidence of health issues did not explain the delay over the entire period. The applicant was able to take steps in her court action while on long-term disability.

[67] In *Richard*, the applicant was not capable of recognizing that she had a claim. That is not the case here.

[68] There was no evidence from the applicant that she thought that an error was made by her counsel. The *Thompson* case does not apply here. One of the applicant's reasons for not filing a grievance was embarrassment and thinking that no one would believe her, which is not consistent with the argument that her failure to file a grievance was an error by her counsel. It is more consistent with an inference that the applicant changed her mind about filing a grievance.

[69] The submission that the applicant feared filing a grievance is not consistent with the evidence. She had already commenced a court action, so it is not fair to say that she was intimidated.

[70] Although it was not necessary to address the other criteria for granting an extension of time because of the lack of a clear, cogent and compelling reason for the delay, the other criteria were not met in any event.

[71] The length of the delay in filing the grievance is considerable. As noted in *Schenkman*, both parties are entitled to closure in disputes.

[72] There is significant prejudice to the Deputy Head in extending the time limit. The mere passage of time is itself a prejudice. The Deputy Head would suffer prejudice as a result of having to produce documents that date back over 10 years. The Deputy Head's evidence would be greatly affected by the fading memories of potential witnesses. Key witnesses are now retired and less accessible. The applicant was a plaintiff in an action and took extensive notes. The Deputy Head was not in the same position and is therefore prejudiced by the delay.

[73] Counsel for the Deputy Head disagreed with the statement by counsel for the applicant that the applicant was directed to get a lawyer. She was advised that, since she did not have a right to bargaining agent representation, her only option was to obtain legal counsel.

[74] Counsel for the Deputy Head agreed with the applicant that the chance of success of the grievance is not a relevant criteria. The allegations are dependent on the fact that it is impossible to address the merits of the grievance.

[75] Counsel for the Deputy Head submitted that, unlike in *Riche*, the Deputy Head was caught by surprise by the grievance since the applicant had already indicated her intention to retire.

[76] Counsel for the Deputy Head submitted that, based on the evidence and the length of the delay, none of the criteria for granting an extension of time are met. Therefore, the application should be dismissed.

C. Reply for the applicant

[77] Counsel for the applicant submitted that there was no evidence that the Deputy Head was surprised by the filing of the grievance. The totality of the evidence demonstrates that there was no surprise.

IV. Reasons

[78] The applicant has argued that her grievance was timely and, in the alternative, has requested an extension of time. For the reasons set out below, I have concluded that the grievance was not timely. In the circumstances of this case, I have decided that an extension of time is not justified.

A. Is the grievance timely?

[79] The applicant made two submissions on timeliness. First, the grievance was timely since the statement of claim can be considered a "grievance." Second, the grievance was timely because the triggering event for the grievance was the retirement of January 31, 2006.

[80] The parties agreed that the grievance was essentially the same as the statement of claim. Indeed, although the grievance had more details, its structure was identical to the statement of claim, and the corrective action requested was identical. The grievance refers to the alleged forced retirement whereas the statement of claim does not. However, a grievance was not filed, and the grievance procedure was not followed in accordance with the *Regulations*. The issue of whether there was an intention to grieve will be addressed in the discussion about an extension of time. The intention to grieve is not a relevant consideration when examining whether a grievance is timely. Although it is not always necessary to file a grievance using a grievance form, it must be clear to the deputy head that a grievance is being filed and the grievance process must be followed: *Tuquabo v. Canada Revenue Agency,* 2006 PSLRB 128 (upheld the Federal Court in, 2008 FC 563 and by the Federal Court of Appeal in 2008 FCA 387). A statement of claim cannot be considered to be a grievance.

[81] The applicant has grieved, among other things, that her retirement was forced. The retirement commenced on January 26, 2006. However, the time limit for filing a grievance relating to a forced retirement starts to run from the time that the employee decides to retire. In her undated note to Mr. Richard, likely sent sometime in August 2005, the applicant made a proposal that included her retirement in November 2005 (Exhibit R-8). She then started the retirement process when she sent an email to her compensation advisor on September 25, 2005. She explicitly stated her intention to retire in her email dated October 5, 2005. Using any of these dates, the grievance would be untimely.

[82] Accordingly, I find that the grievance was not timely.

B. Is an extension of time to file the grievance warranted?

[83] The following five criteria used by the Chairperson in deciding whether to exercise his or her discretion to grant an extension of time are well-known:

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the grievor;
- balancing the injustice to the employee against the prejudice to the deputy head; and
- the chance of success of the grievance.

[84] In my view, if there are no clear, cogent or compelling reasons for the delay, there is no need to proceed to assess the other four criteria. In light of my conclusion (set out below in this decision) that there are no clear, cogent or compelling reasons for the delay, I do not need to address the other criteria. However, I have addressed all five criteria in my reasons.

C. Reasons for the delay: are they clear, cogent and compelling?

[85] The applicant provided a number of reasons for the delay: health issues; the fear of filing a grievance; the representation by the Deputy Head's representative that she could not file a grievance and the errors of her counsel. I will address each reason in turn.

[86] The applicant did lead evidence on her health at various times during her conflicts at work. However, she was not totally disabled at all times and in fact was well enough to be actively involved in litigation during key points during this time. The *Riche* and *Richards* decisions on their facts are not applicable here. The applicant provided no medical evidence for the period after 2002. She also testified that her health began to improve in 2004. I do not accept her health status as a clear, cogent or compelling reason for granting an extension.

[87] The applicant did not present evidence to support her statement that she was afraid to file a grievance during this period. She was capable of commencing a legal action against her employer in 2002 and of amending that statement of claim in 2005. This is directly counter to any suggestion that she was afraid to file a grievance. The evidence does not show that she was afraid to file a grievance, and therefore this is not a clear, cogent or compelling reason.

[88] The applicant alleges that she was told that she did not have a right to file a grievance. The evidence was not clear on this point, as she testified that she did not

have a good recollection of the meeting in which it is alleged the statement was made. In addition, no other witness was called to support the statement.

[89] However, even if it could be proven that the applicant was told she could not file a grievance, she was represented by legal counsel during this time. The role of counsel or a representative is to provide advice on, among other things, recourse options. In *Schenkman* I noted that there is an obligation on an employee to check on bold assertions affecting their rights made by management representatives. There was no question at the time that the applicant had a right to file a grievance. Employees in the PE category had filed grievances in the past (e.g., see *Gannon v. Treasury Board (Department of National Defence),* 2002 PSSRB 32; reversed by the Federal Court of Appeal in *Gannon v. Canada (Attorney General)*, 2004 FCA 417) on other grounds. The *Vaughan* decision of the Supreme Court of Canada foreclosed access to the courts for disputes with the employer in most cases, but did not address the right of unrepresented or excluded employees to file grievances.

[90] A related argument of the applicant was that she should not be penalized for "errors" of her counsel. The applicant relied on *Jarry v. Antonopoulos* and *Thompson*. In the first case, the error related to the time limits for a referral of grievances to the subsequent grievance level and then a failure to communicate when the counsel thought that the grievances had already been referred. In the second case, the delay appeared to be an oversight or failure to act. Administrative errors or failures in communication are qualitatively different from errors in determining recourse options. When an employee is represented, she remains accountable for her actions taken on the basis of the advice given. Those providing the advice are held accountable through other means, such as a professional licensing body.

[91] In conclusion, I find that the applicant has not demonstrated any clear, cogent or compelling reasons for granting an extension of time.

D. <u>Length of the delay</u>

[92] The length of the delay in filing the grievance is significant. Even if the clock is started at the time that she decided to commence the process for retiring in September 2005, the length of time is still significant. The length of delay is a factor in itself, but also has implications for the criteria of prejudice to the Deputy Head, discussed below.

E. <u>Due diligence of the grievor</u>

[93] The applicant was not diligent in pursuing her right to grieve. When it became clear to her that she had a right to grieve, she did not pursue that avenue but maintained her civil action. In correspondence to counsel for the Deputy Head in May of 2005, counsel for applicant said that a grievance would be filed, if the Deputy Head did not object to timeliness (Exhibit A-7). A grievance was not filed until approximately nine months later, in February 2006. This does not demonstrate due diligence on the part of the applicant.

[94] In addition, from the applicant's actions in pursuing retirement options, it can be concluded that she no longer had an intent to grieve. At the very least, she was not diligently pursuing her right to grieve at this point.

F. <u>Balancing injustice against prejudice</u>

[95] Under this criteria, I must weigh the injustice to the applicant in not allowing her grievance to be filed, against the prejudice to the Deputy Head in proceeding. Many of the events at issue in this grievance go back 13 or more years. The Deputy Head is entitled to some certainty in knowing that disputes will be addressed in a timely manner. The prejudice to the Deputy Head includes the challenges of defending allegations from over a decade prior to the filing of the grievance. The challenge mostly relates to the ability to reconstruct events through both documents and witnesses. I accept that there may be a significant amount of documents that have been retained by the applicant. What is more challenging for the Deputy Head is the availability and memories of witnesses. The applicant has kept detailed notes of her experiences. There was no evidence that the potential witnesses did the same.

[96] The injustice to the applicant is not insignificant. I accept that she feels strongly about the way that she was treated by the Deputy Head. However, this is not a case of a termination where the applicant is without income. This applicant is receiving income through her pension. The injustice to the applicant that she expressed most clearly was her desire to restore her reputation.

[97] In my view, the prejudice to the Deputy Head is significant. On balance, the prejudice to the Deputy Head outweighs any injustice to the applicant. I hope that the applicant will take some solace from the praise of Mr. Rochefort for her work that he

expressed at the hearing and the fact that she received a number of awards for her contribution to the public service.

G. Chances of success of the grievance

[98] The parties agree that this criterion is difficult to measure in the circumstances of this case. I agree that this criterion is a weak one that may only come into play when a grievance can be characterized as either trivial or vexatious. This is not the case here. Therefore, I did not rely on this criterion to assess the application.

[99] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[100] The grievance is untimely.

[101] The application for an extension of time is dismissed.

[102] The grievance is dismissed.

May 31, 2010.

Ian R. Mackenzie,
Vice-Chairperson and
adjudicator